

S.B. Civil Misc. Appeal No.342/2003

Smt. Manohar Kanwar and others.

vs.

Nahar Singh and others.

Date : 24.7.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. Pradeep Shah, for the appellants.

Mr. RS Mankad, for the respondents.

- - - - -

Heard learned counsel for the parties.

The present appeal is directed against the order 21.1.2003 by which the first appellate court after setting aside the judgment and decree of the trial court dated 19.2.2002 remanded the suit itself for framing additional issues in the light of the pleas taken by the defendants in para no.11 of the written statement and to decide the suit afresh after giving opportunity to the parties to lead evidence.

Learned counsel for the respondents has raised a preliminary objection about maintainability of the appeal. According to learned counsel for the respondents, against the order of remand under Order 41 Rule 25 CPC where the appellate court has directed the trial court to frame issue and decide the suit afresh, the appeal is not provided under Order 43 Rule 1(u) CPC. Learned counsel for the

respondents relied upon the Division Bench judgment of this Court in the case of Natha vs. Mst. Chunni reported in 1953 RLW 483.

Learned counsel for the appellants submitted that in this case, decree has been set aside by the first appellate court and the first appellate court has not framed the issue but directed the trial court to frame issue and take evidence and thereafter decide the suit, therefore, the remand order is not under Order 41 Rule 25 CPC but is under Order 41 Rule 23A CPC and, therefore, the appeal is competent under Order 43 Rule 1(u) CPC.

I have considered the arguments of learned counsel for the parties on preliminary objection.

It is clear from Order 41 Rule 25 CPC that the appellate court can frame and refer the issues to the trial court for trial and decision thereof while keeping the appeal pending before the appellate court. This can be done by the appellate court without setting aside the decree of the trial court. The findings on all or other issues of the trial court recorded in the impugned judgment are considered by the appellate court after the receipt of the finding of the trial court on newly framed issues. If any order is passed under Order 41 Rule 25 CPC, against such order, the appeal is not provided under Order 43 Rule 1(u) or elsewhere. The Division Bench of this Court in Natha's case (supra) also held so.

In this case, since the judgment and decree itself has been set aside by the first appellate court and the first

appellate court also directed the trial court to frame the issue and decide the suit afresh after taking evidence, therefore, it is not an order under Order 41 Rule 25 CPC, hence is appealable.

The preliminary objection raised by learned counsel for the respondent is accordingly rejected.

Learned counsel for the appellants on merits submitted that the court below has committed serious error of law in setting aside the judgment and decree of the trial court which has been recorded after evidence of both the parties and by deciding all the issues. It is also submitted that there was no necessity to frame additional issues but even if there was any necessity to frame additional issues, even then those issues have no material bearing on the issues framed and decided by the trial court. In fact, the issue proposed by the respondents are not in relation to the merit of the claim of the parties but with respect to the procedure of hearing of the suit by the Court. In view of the above, the order setting aside the judgment and decree of the trial court is absolutely illegal and contrary to Order 41 Rule 24 CPC.

Learned counsel for the respondents submitted that any finding recorded by the Court which had no jurisdiction is no finding in the eye of law, therefore, if the court reaches to the conclusion that the court has no jurisdiction, then the findings cannot be recorded on

merits of the claim of the parties. Therefore, the first appellate court rightly set aside the judgment and decree of the trial court and remanded the matter back to the trial court.

I have considered the submissions of learned counsel for the parties and perused the facts of the case and the relevant provisions of Rules 23A, 24 and 25 of Order 41 as well as Order 43 Rule 1(u) CPC.

It is clear from the issues framed by the trial court which are quoted in the impugned order of the first appellate court that the trial court framed the issues on merits of the claim of the parties and also framed issue no.5 on the basis of the plea taken by the defendants. It is true that the trial court did not frame the issue on the question of pecuniary jurisdiction of the court as well as inherent jurisdiction of the court. The defendants' plea was twofold – one that the suit was not triable by the civil court and that the plaintiff has not properly valued the suit and if the suit is valued properly, it is beyond the pecuniary jurisdiction of the trial court. From the plea taken by the defendants in para no.11 of the written statement, it is clear that those pleas have nothing to do with the claim and merits of the claims of both the parties. Therefore, the finding recorded by the trial court on all issues could not have been set aside by the appellate court merely because in the opinion of the appellate court, more issues are required to be framed in

the suit. Since the question of suit valuation was question of fact and law, therefore, the appellate court could have referred the issue to the trial court for deciding the issue after recording evidence. But parties cannot get the opportunity to lead evidence on the issues upon which the parties already led the evidence. The evidence on the issues of suit valuation, court fees and jurisdiction of civil court had nothing to do with the finding on issues of merit of the claims of the parties. If both the issues are decided in favour of the defendants by the trial court and it is held that the suit is not triable by the civil court, then the consequences will follow naturally but before final decision, the appellate court itself examine the legality and validity of the finding of the trial court on newly framed issues about question of jurisdiction of the Court and suit valuation and upon that decision, the appellate court will decide the appeal on all issues about rival claims of the parties. There was no justification for setting aside of the findings recorded by the court on all the other issues.

In view of the above, this appeal is partly allowed and the order of the first appellate court dated 21.1.2003 setting aside the judgment and decree dated 19.2.2002 is set aside. The regular first appeal shall remain with the first appellate court and the trial court is directed to frame the issue on question of suit valuation and question of jurisdiction of the civil court in the light of the pleadings of the defendants in para no.11 of their written

statement. The trial court shall give an opportunity to both the parties to produce evidence and shall decide both the issues within a period of three months from the date of receipt of the record and copy of this order and shall send the findings to the first appellate court. Record be sent forthwith to the court below.

Both the parties are directed to remain present in court before the trial court on 23.8.2006.

(PRAKASH TATIA), J.

S.Phophaliya